HAIRUL DIN ZAINAL ABIDIN

v.

PP

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
ABDUL AZIZ MOHAMAD JCA
[CRIMINAL APPEAL NO: W-05-8-2001]
23 SEPTEMBER 2003

CRIMINAL PROCEDURE: *Sentence - Possession of 953.2 grammes of cannabis - Sentence of 10 years' imprisonment and 10 strokes of the rattan - Whether adequate - Invocation of s. 39A(2) Dangerous Drugs Act 1952 thereof - Whether proper - Whether to be sentenced under s. 6 of Act*

The appellant had been convicted of an offence under s. 6 of the Dangerous Drugs Act 1952 ('the Act'), for possession of 953.2 grammes of cannabis, and was sentenced to 10 years' imprisonment and 10 strokes of the rattan pursuant to s. 39A(2) of the Act. In this appeal against the conviction and sentence, arguments were put forth that the appellant, having been convicted under s. 6 of the Act, ought to have been sentenced under the same section, and not under s. 39A(2) as opted for by the learned judge. It was further argued that there was a failure by the prosecution to explain the difference in weight of the cannabis as found by the Investigation Officer and the chemist respectively, resulting in the actual weight of the cannabis not being proved, and that being so, the appropriate 'punishment section' ought to be s. 6, which carries a punishment of a fine not exceeding RM20,000 or an imprisonment not exceeding five years or both, and not s. 39A(2) of the Act.

Held:
Per Mokhtar Sidin JCA

[1] The learned judge knew of the difference in weight and he explained it by stating that the weight taken by PW2 was inclusive of the masking tape while the weight given by the chemist was the weight of the cannabis alone without the masking tape. There is no fault in the explanation given and this court could not find any reason not to accept the same. (p 135 b-c)

[2] The weight of cannabis as stated in the charge was 953.2 grammes which was the nett weight found by the chemist. The appellant was hence given the benefit of the doubt, as the weight stated was the lesser of the two weights. However, even with the lesser weight, the cannabis found to be in his possession had far exceeded the weight prescribed under s. 39A(1)(f) of the Act, which was 50 grammes. The learned judge was thus right in amending the charge (from s. 39B to s. 6) and imposing a punishment under s. 39A(2) of the Act. (p 135 d-e)

[3] The learned judge had applied the correct principle of sentencing when imposing the sentence on the appellant. There is no ground to disturb the sentence imposed. (p 136 h)

Per Abdul Aziz Mohamad JCA

[1] The point taken up by the appellant, namely that he should be made liable to the penalty under s. 6 and not the increased penalty under s. 39A(2), was a point as to penalty, and the submission as to the credibility of the chemist's report went to credibility as to the weight of the substance and not as to its nature, namely, the cannabis. Therefore, although the appellant's notice stated that the appeal was both against conviction and sentence, the point taken was only as to sentence, and even as to sentence, the point was that it should be under s. 6, and not that the sentence imposed, as a sentence properly under s. 39A(2), was excessive. There was no submission as to the severity of the sentence imposed if the correct penalty section was s. 39A(2). (p 138 c-e)

[2] There is no merit in the point as to the weight of the cannabis. There was no reason to doubt the correctness of the weight of 953.2 grammes as found by the chemist. As the trial judge said, the difference was due to the fact that the chemist weighted the substance only, whereas the Investigation Officer weighed it together with the masking tape. The appellant was correctly sentenced under s. 39A(2) of the Act. (p 138 f-g)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu telah disabitkan dengan kesalahan di bawah s. 6 Akta Dadah Berbahaya 1952 ('Akta') kerana memiliki 953.2 gram kanabis, dan telah jatuhkan hukuman 10 tahun penjara dan 10 sebatan di bawah s. 39A(2) Akta. Dalam rayuan terhadap sabitan dan hukuman di sini, hujah-hujah telah dikemukakan bahawa oleh kerana perayu disabitkan di bawah s. 6 Akta, maka beliau seharusnya dihukum di bawah seksyen yang sama, dan bukannya di bawah s. 39A(2) seperti yang dilakukan oleh yang arif hakim. Dihujahkan selanjutnya bahawa terdapat kegagalan di pihak pendakwaan untuk menjelaskan perbezaan yang terdapat pada berat kanabis yang diperolehi oleh Pegawai Penyiasat dengan yang diperolehi oleh ahli kimia, yang menyebabkan berat sebenar kanabis gagal dibuktikan, dan oleh kerana itu, 'seksyen hukuman' yang betul adalah s. 6 yang membawa hukuman denda tidak melebihi RM20,000 atau penjara tidak melebihi 5 tahun atau kedua-duanya sekali, dan bukannya s. 39A(2) Akta.

Diputuskan:
Oleh Mokhtar Sidin HMR

[1] Yang arif hakim mengetahui tentang perbezaan pada berat kanabis dan beliau memberi penjelasan dengan menyatakan bahawa berat yang diambil oleh PW2 adalah termasuk berat pita pembalut sementara berat yang diperoleh ahli kimia hanyalah berat kanabis tersebut sahaja tanpa pita pembalut. Tiada kecacatan pada penjelasan ini dan tiada alasan bagi mahkamah untuk tidak menerima penjelasan tersebut.

[2] Berat kanabis seperti yang tercatat pada pertuduhan adalah 953.2 gram dan ia adalah berat seperti yang didapati oleh ahli kimia. Manfaat keraguan dengan itu telah diberikan kepada perayu, kerana berat ini adalah yang lebih ringan di antara kedua-dua berat tersebut. Namun, walaupun dengan berat yang lebih ringan ini, kanabis yang didapati di dalam milik perayu adalah jauh lebih berat dari yang tercatat dalam s. 39A(1)(f), iaitu 50 gram. Yang arif hakim dengan itu betul bilamana meminda pertuduhan (dari s. 39B kepada s. 6) dan menjatuhkan hukuman di bawah s. 39A Akta.

[3] Yang arif hakim telah menggunapakai prinsip hukuman yang betul apabila menjatuhkan hukuman ke atas perayu. Tidak terdapat alasan untuk mengganggu hukuman yang dijatuhkannya itu.

Oleh Abdul Aziz Mohamad HMR

[1] Hujah yang dibangkitkan oleh perayu, iaitu bahawa beliau seharusnya tertakluk kepada hukuman di bawah s. 6 dan bukannya hukuman lebih berat di bawah s. 39A(2), adalah hujah berkaitan hukuman, sementara hujah berhubung kebolehpercayaan laporan kimia adalah berkaitan kebolehpercayaan yang menyentuh berat dadah dan bukannya sifatnya, iaitu, kanabis tersebut. Oleh yang demikian, walaupun notis perayu menyatakan bahawa rayuan adalah terhadap kedua-dua sabitan dan hukuman, hal yang dibangkitkan hanyalah berkaitan hukuman, dan itu pun, halnya adalah bahawa ia sepatutnya dibuat dibawah s. 6, dan bukannya bahawa hukuman yang dijatuhkan, sebagai suatu hukuman yang teratur di bawah s. 39A(2), adalah terlampau berat. Tiada hujah dikemukakan berkenaan keberatan hukuman yang dikenakan jika sekyen hukuman yang betul adalah s. 39A(2).

[2] Tiada merit atas hujah yang berkaitan dengan berat kanabis. Tiada alasan untuk meragui kebetulan berat 953.2 gram sepertimana yang didapati oleh ahli kimia. Sebagaimana yang dikatakan oleh hakim bicara, perbezaan adalah disebabkan ahli kimia hanya menimbang dadah semata-mata, sedangkan Pegawai Penyiasat menimbangnya bersekali dengan pita pembalut. Perayu telah dihukum dengen betul di bawah s. 39A(2).

Rayuan ditolak.]

Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 39A(1)(f), (2), 39B

For the appellant - Gobind Singh Deo; M/s Karpal Singh & Co
For the respondent - Shahrizal Shaari DPP

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-46-2000]

Reported by WA Sharif

JUDGMENT

Mokhtar Sidin JCA:

The appellant in this appeal appealed against the sentence imposed by the High Court for an offence under s. 6 of the Dangerous Drugs Act 1952 ("the Act") and punishable under s. 39A(2) of the Act. The appellant was originally charged in the High Court under s. 39B of the Act but at the close of the case for the prosecution the learned trial judge amended the charge to one under s. 6 of the Act. The appellant was sentenced to ten years imprisonment from the date of his arrest and also ten strokes of the rotan after he elected to remain silent when the amended charge was read to him.

The facts as stated by the learned judge were, on 16 June 2000, Chief Inspector Yap Huat Tian led a police party to a flat number Block 4, Desa Tun Razak, Sungei Besi, Kuala Lumpur. At about 11.15pm Chief Inspector Yap Huat Tian who was at a higher floor of the flat saw the appellant walking towards the lift. Chief Inspector Yap Huat Tian then instructed Lance Corporal Lim Hee Jiang and Corporal Romli to arrest the appellant. Chief Inspector Yap Huat Tian then came down to the ground floor. When he reached the ground floor he saw the appellant had already been arrested by Lance Corporal Lim Hee Jiang and Corporal Romli. Lance Corporal Lim Hee Jiang gave evidence that when he and Corporal Romli identified themselves as police officers the appellant attempted to run away. When Lance Corporal Lim arrested the appellant, he took possession of a white plastic bag with the word "Starmart" which the appellant was holding. Lance Corporal Lim then handed over the plastic bag to Chief Inspector Yap. Chief Inspector Yap opened the plastic bag in front of the appellant and inside it Chief Inspector Yap found a packet wrapped in old newspapers.

In the packet, Chief Inspector Yap found some plant materials wrapped with masking tape which he suspected to be cannabis. After analysis the chemist confirmed the plant materials to be cannabis weighing 953.2 grammes. At the close of the case for the prosecution the learned counsel for the appellant submitted that the prosecution failed to make out a *prima facie* case against the appellant based on two grounds:

(i) the prosecution failed to prove the weight of the dangerous drugs; and

(ii) in a case of trafficking, as in this case, knowledge of possession of the dangerous drugs must be proved by direct evidence.

The learned judge found that there was no merit on the first ground submitted by the appellant's counsel but upheld the second ground raised by the appellant's counsel in that the prosecution failed to prove by way of direct evidence that the appellant had knowledge that in his possession, the drug 'cannabis'. Even though there was evidence to show that the appellant attempted to run at the time of his arrest, that was not sufficient to show that he had knowledge of the drug.

In his judgment, the learned judge stated that the evidence by the prosecution proved that the appellant had only possession of the cannabis to which the appellant's counsel conceded. The learned judge then proceeded to amend the charge against the appellant to one under s. 6 of the Act punishable under s. 39A(2) of the Act. When the amended charge was read to the appellant he

claimed trial to the amended charge. After the three alternatives were read and explained to him, the appellant elected to remain silent. The learned judge then found the appellant guilty of the amended charge and convicted the appellant.

In mitigation, the appellant's counsel submitted that the appellant was 27 years of age at the time of the trial and unmarried. The learned deputy public prosecutor stated that the appellant had no previous convictions but pressed for a deterrent sentence in view of the amount of cannabis found to be in the possession of the appellant was 26 times more than the permissible limit.

The learned judge then sentenced the appellant to ten years imprisonment and ten strokes of the rotan.

Being dissatisfied with that decision the appellant appealed to this court against his conviction and sentence. Before us, the learned counsel for the appellant submitted that the amended charge against the appellant was under s. 6 of the Act, and as such he should be punished under the same section and not under s. 39A(2) of the Act. The punishment under s. 6 of the Act is a fine not exceeding RM20,000 or an imprisonment not exceeding five years or both. The appellant's counsel submitted that the weight of cannabis found by the chemist was different from the weight found by the police. As such there was a material gap as to the weight of cannabis found to be in the possession of the appellant. The appellant's counsel submitted further that the onus of proof was on the prosecution to prove the actual weight of cannabis found to be in the appellant's possession. Failure by the prosecution to do so would warrant the benefit of doubt be given to the appellant. Since the actual weight of cannabis was not proved the punishment to be imposed on the appellant should be under s. 6 and not under s. 39A(2) of the Act. In this respect the learned trial judge in his judgment stated:

> With regard to the first objection raised by learned counsel it was his contention that the weight of the dangerous drugs as found by PW2 was different from that stated in the chemist report. He said that this means the evidence advanced by the prosecution in relation to the weight of the dangerous drugs is contradictory and unsatisfactory and as such ought to be rejected. This submission is answered by the evidence of PW2 who having said that there was a difference in the weight of the dangerous drugs as weighed by him and as stated in Exhibit P16 said in re-examination that he weighed the dangerous drugs together with the masking tape. It must, however, be observed that the weight referred to in Exhibit P16 is the "berat bersih". That explains the difference in the weight of the dangerous drugs as weighed by PW2 and the chemist. Surely the nett weight of the dangerous drugs must be different compared to its weight when weighed with the masking tape. It follows that the difference in weight must be due to the weighing of the

> exhibit by PW2 together with the masking tape. In any event the evidence of PW2 clearly establishes that the whole of the dangerous drugs that he received was sent to the chemist for analysis. He was not cross-examined in any way on this issue. What therefore PW2 and the chemist weighed was the whole of the dangerous drugs seized. ...

It is clear from the above passage that the learned trial judge knew of the difference in weight and he explained why there was a difference in weight in that the weight taken by PW2 included the masking tape while the weight given by the chemist was the weight of the cannabis alone without the masking tape. As can be seen the difference in weight was 26 grammes which would be the weight of the masking tape. I see no fault in the explanation given by the learned judge and I could not find any reason not to accept the explanation given by him.

The weight of cannabis stated in the charge was 953.2 grammes which was the nett weight of cannabis as found by the chemist. The weight as found by PW2 would be 26 grammes more than the 953.2 grammes as stated in the charge. In my view, the appellant was given the benefit of the doubt when the weight stated in the charge was the lesser weight. Even with this lesser weight the cannabis found to be in the possession of the appellant far exceeded the prescribed weight of cannabis under s. 39A(1)(f) which is 50 grammes. I see no merit in the submission of the appellant's counsel. The learned judge was right in amending the charge where the punishment should be under s. 39A(2) of the Act.

In respect of the appeal by the appellant against the sentence imposed by the court, I would only have to refer to the judgment of the learned trial judge where he stated:

> In his plea in mitigation learned counsel merely said that the accused is aged 27 and is unmarried. The learned Deputy Public Prosecutor informed the Court that the accused had no previous convictions and prayed for an appropriate sentence as the weight of drugs involved in this case is about 20 times more than the prescribed limit. It is settled law that any sentence to be passed must be a balance between the public interest to be served and the interests of the person to be sentenced. The manner in which public interest is affected by drug abuse has been appropriately dealt with in *PP v. Loo Choon Fatt* [1976] 2 MLJ 256. The position is the same, if not worse, today (see *Ang Chai Seng v. PP* [2000] 2 MLJ 35). The seriousness of the drug menace must therefore be reflected in the sentence to be passed so that the requirements of public interest can be served effectively. At the same time it must be realized that the proper sentence for each drug offence depends on its own peculiar

circumstances. It has been held that the weight of the drugs found on a person plays a significant role in assessing the appropriate sentence (see *Zaidon Shariff v. PP* [1996] 4 CLJ 441). In this regard I refer to *PP v. Tia Ah Leng* [2000] 5 MLJ 401 where I had the occasion to say at p. 412:

> As the penalties for drug offences under the Act vary dependent on the weight of drugs involved the imposition of the maximum sentence in a particular case will be guided by the weight though it cannot be the yardstick in all cases. In saying this I refer to *R v. Laurentiu and Bechru* [1992] 63 A Crim R 402 where Wood J observed that it is not entirely appropriate to place too much emphasis on the precise quantity of the drug involved, because in some cases the possession relates to that of an intermediary of principal in the course of an enterprise that is judged particularly criminal, whereas in other cases the possession may be that of the end user. Be that as it may, I must immediately observe that these mitigating circumstances may be displaced in a particular case where the quantity of drugs involved is large. This is because quantity can in fact supply evidence of motive (personal need versus greed), degree of involvement, and potential for damage to community as well as being an indicator of the gravity of the offence (see *Sentencing: State and Federal Law in Australia* 2nd Ed by Fox and Freiberg p 1009). A claim of possession for mere personal consumption may also be not sustainable if the street value of the drugs is disproportionate to the financial standing of an accused. The mitigating effect of merely being an intermediary may also be weakened if the quantity of drugs is large thereby indicating active involvement in the enterprise. The absence of any of these circumstances in favour of an accused would be an indication of his heinous intention and thereby militate against innocent possession with the result that the imposition of the maximum sentence may be justified.
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> The plea in mitigation of the accused consisted of a mere statement of his age and marital status. He did not give evidence so as to enable the Court to ascertain the role he played in being found in possession of the dangerous drugs. Neither did he state anything to that effect in his plea in mitigation. The weight of the dangerous drugs involved does not support the inference that he kept them for his own consumption. In the circumstances, bearing in mind the principles of sentencing that I have referred to and the fact that the accused is a first offender I convicted him and imposed a sentence of 10 years imprisonment and 10 strokes of the rotan.

It is clear to me that the learned judge had applied the correct principle of sentencing when he imposed the sentence on the appellant. Before us, the appellant's counsel repeated the same mitigation that he did in the court below. No new issue was raised in respect of the mitigation. As such I could not find any ground to disturb the sentence imposed by the learned judge.

For the above reasons, we dismissed the appeal in respect of conviction and the sentence. We affirmed the conviction and the sentence imposed by the learned judge.

Abdul Aziz Mohamad JCA:

In the High Court, the appellant was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 with trafficking in 953.2 grammes of cannabais, an offence punishable with death under s. 39B(2). At the close of the case for the prosecution, the judge, finding that the prosecution had failed to make out as a *prima facie* case of trafficking, amended the charge to one of possession of 953.2 grammes of cannabis under s. 6, punishable under s. 39A(2). Although the penalty prescribed by s. 6 for possession of cannabis is a fine not exceeding twenty thousand ringgit or imprisonment not exceeding five years or both, s. 39A(2) makes mandatory an increased penalty of imprisonment for life or not less than five years and whipping of not less than ten strokes where the dangerous drug involved is of a certain amount. In the case of cannabis, the amount prescribed by para. (f) of s. 39A(2) is 50 grammes or more in weight.

Although the appellant claimed trial to the amended charge, when called upon to enter upon his defence, he elected to remain silent. He was found guilty of the amended charge and sentenced to ten years' imprisonment and ten strokes of whipping in accordance with s. 39A(2).

At the hearing of the appellant's appeal before us, his counsel said that he would take up only one point. The facts relating to this point were as follows. The substance that was seized from the appellant was, according to the police witnesses, in the form of a block of compressed plant material wrapped in masking tape, and this was sent to the chemist for analysis in a box marked "Z". The chemist, in his report under s. 399 of the Criminal Procedure Code, said this:

> Saya telah memeriksa kotak bertanda "Z" dan mendapati di dalamnya satu bungkusan plastik dibalut dengan pita pelekat bertanda 'A2' mengandungi 953.2 gram (berat bersih) satu bongkah bahan tumbuhan termampat. Setelah dianalisis, saya dapati bahan tumbuhan tersebut adalah "cannabis".

I interpose to remark that while it may be understood from that statement that when the chemist received the exhibit the block of compressed plant material was wrapped in plastic which was in turn wrapped in masking tape, from the evidence of the police witnesses it may be understood that the block was wrapped directly in masking tape without any intervening plastic. I noticed this when preparing these grounds and feel that I ought, in the interests of accuracy, to mention it although nothing arose from it in the High Court or in the appeal. To continue with the facts in examination-in-chief, the Investigation Officer

(PW2) said that he did weigh the compressed block, that is before he sent it to the chemist. He said, "Saya timbang ketulan mampat itu". In cross-examination, when he was referred to the chemist's report, he said, "Saya ada timbang barang kes itu. Jumlah berat yang saya timbang adalah berbeza dengan berat di laporan kimia". He did not, however, state what was the weight that he got and neither was there any other evidence of it. In re-examination he said, "Saya timbang masking tape yang berisi ketulan mampat".

On the basis of that evidence, the appellant's counsel raised before us his only point. The gist of it was that the prosecution failed to explain the difference between the weight found by the Investigation Officer and that found by the chemist, and the consequence of the unexplained difference ought to be that the credibility of the chemist's report was open to question and that there was no proof of the weight of the substance. Therefore the appellant should be made liable to the penalty under s. 6 and not the increased penalty under s. 39A(2). It was a point as to penalty, as set out in para. 1 (a)(iii) of the petition of appeal, and the submission as to the credibility of the chemist's report went to credibility as to the weight of the substance and not as to its nature, namely, cannabis. Therefore although the appellant's notice of appeal dated 23 March 2001 stated that the appeal was both against conviction and sentence, the point taken up on appeal was only as to sentence, and even as to sentence, the point was that it should be under s. 6, and not that the sentence imposed, as a sentence properly under s. 39A(2), was excessive, although para. 4 of the petition of appeal did complain that the sentence was excessive. There was no submission by the appellant's counsel as to the severity of the sentence imposed if the correct penalty section was s. 39A(2).

In my view there was no merit in the point as to the weight of the cannabis. There was no reason to doubt the correctness of the weight of 953.2 grammes as found by the chemist. As the trial judge said, the difference in the weight was due to the fact that the chemist weighed the substance only, whereas the Investigation Officer weighed it together with the masking tape. The appellant was correctly sentenced under s. 39A(2). There was no merit in the appeal and it was dismissed.